Integrated Health Services, Inc. *and* District 1199, the Health Care and Social Service Union, SEIU, AFL–CIO. Cases 8–CA–31566, 8–CA–31630, 8–CA–31644, and 8–CA–31802

September 30, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On April 23, 2001, Administrative Law Judge Margaret M. Kern issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Integrated Health Services, Inc., with offices located in Washington Square in Warren, Crestwood Care Center in Shelby, Meadowview Care Center in Seville, Canterbury Villa of Alliance in Alliance, Auburn Manor in Washington Court House, Rosewood in Galion and Village Care in Galion, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(b).

"(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including any electronic copy of such records if stored in electronic form, necessary to analyze, if appropriate, the wages and benefits rescinded under the terms of this Order."

[1] The Respondent argues on exception that art. 26 of its collective-bargaining agreements with the Union (the "Patient Care" provision) was tantamount to a midterm contract reopener clause, implicitly obligating the Union to bargain over the Respondent's wage increase proposals. For purposes of this decision, Chairman Hurtgen need not consider this defense, which is neither litigated nor timely raised and pursued, only first appearing in the Respondent's posthearing brief to the judge.

[2] We will modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.,* 335 NLRB 142 (2001).

Allen Binstock, Esq., for the General Counsel.
Clifford Nelson, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET M. KERN, Administrative Law Judge. This case was tried before me in Cleveland, Ohio, on January 30 and 31, 2001. The consolidated complaint, which issued on July 31, 2000, and the amended consolidated complaint which issued on September 28, 2000, were based on unfair labor practice charges filed on May 8 and 31, June 9, and August 4, 2000, by District 1199, the Health Care and Social Service Union, SEIU, AFL–CIO (the Union) against Integrated Health Systems, Inc. (Respondent).[1] Respondent filed an answer to the consolidated complaint on August 15 and filed an answer to the amended consolidated complaint on October 16. Respondent filed a further amended answer to the amended consolidated complaint on January 29.

The General Counsel alleges that from October 1, 1999, to August 7, Respondent unilaterally implemented wage increases at seven of its facilities during the term of its collective-bargaining agreements with the Union. Respondent admits that it made these changes but defends its actions on several grounds, including that operational exigencies mandated that Respondent take these actions and that the Union unreasonably withheld its consent. For the reasons set forth herein, I find that since March 7, Respondent violated Section 8(a)(1) and (5) by granting wage increases and by modifying the rates of pay of employees without the Union's consent.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent owns and operates long-term care facilities throughout the United States. Seven facilities in Ohio are involved in this case: Washington Square in Warren, Crestwood Care Center in Shelby, Meadowview Care Center in Seville, Canterbury Villa of Alliance in Alliance, Auburn Manor in Washington Court House, Rosewood in Galion and Village Care in Galion. These facilities are licensed by the State of Ohio and operate under State and Federal Medicare and Medicaid guidelines. These guidelines dictate, in part, minimum staffing requirements. Respondent maintains its own staffing requirements which are more stringent than the Government-mandated requirements.

[1] At the hearing, the complaint was amended to reflect the correct name of Respondent, Integrated Health Services, Inc. All dates are in 2000 unless otherwise indicated.

Previous to Respondent's operation of these seven facilities, they were owned and operated by Horizon Healthcare. The Union's representation of employees at these facilities dates back to at least 1990 at Rosewood and Village Care, and to 1995 at the remaining facilities. In October 1996, the Board conducted an election at the Rosewood facility and the registered nurses (RNs) voted for inclusion in a unit of licensed practical nurses (LPNs). Shortly after the Union was certified, Horizon and the Union agreed to include the RNs and LPNs in an overall service and maintenance unit. There is no evidence that self-determination elections were conducted for the RNs at any of the other facilities. Following Respondent's acquisition of the facilities in January 1998, the Union continued to represent the same employees in the same bargaining units as it did under Horizon's ownership, with RNs continuing to be represented with nonprofessional employees.

In January 1999, negotiations commenced between Respondent and the Union for renewal contracts and 12 to 14 bargaining sessions were conducted. The Union and Respondent entered into three collective-bargaining agreements effective April 1, 1999, to March 31, 2002. The following unit descriptions are set forth in the respective collective-bargaining agreements:

> *Unit A*: All service and maintenance employees at the Employer's following facilities: Auburn Manor in Washington Court House, Crestwood Care Center in Shelby, Meadowview Care Center in Seville, Canterbury Villa of Alliance in Alliance, Washington Square in Warren, Baltic Country Manor in Baltic, Horizon Meadows in Alliance, Hudson Elms Nursing Home in Hudson and Village Square in Stow, including but not limited to: state tested nurses aides, environmental aides, supply clerks, ward clerks, cooks, dietary aides, laundry aides, housekeepers, maintenance workers, activities assistants, rehabilitation aides, restorative aides, and registered and licensed practical nurses; but excluding clerical employees, confidential employees, Director of Maintenance, Director of Social Services, Director of Activities, therapists, licensed physical therapy assistants, temporary employees, professional employees and all guards and supervisors as defined in the National Labor Relations Act.
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> *Rosewood unit*: All service and maintenance employees at the Employer's Rosewood facility in Galion, Ohio, including but not limited to: state tested nurses aides, environmental aides, supply clerks, ward clerks, cooks, dietary aides, laundry aides, housekeepers, maintenance workers, activities assistants, rehabilitation aides, restorative aides, and registered and licensed practical nurses; but excluding clerical employees, confidential employees, Director of Maintenance, Director of Social Services, Director of Activities, therapists, licensed physical therapy assistants, temporary employees, professional employees and all guards and supervisors as defined in the National Labor Relations Act.
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> *Village Care unit*: All service and maintenance employees at the Employer's Village Care facility in Galion, Ohio, including but not limited to: state tested nurses aides, environmental aides, supply clerks, ward clerks, cooks, dietary aides, laundry aides, housekeepers, maintenance workers, activities assistants, rehabilitation aides, restorative aides, and registered and licensed practical nurses; but excluding clerical employees, confidential employees, Director of Maintenance, Director of Social Services, Director of Activities, therapists, licensed physical therapy assistants, temporary employees, professional employees and all guards and supervisors as defined in the National Labor Relations Act.

Article 34 sets forth the starting wage rates for each job classification at each facility, as well as the increases to be given every 6 months. Starting wages are not uniform among the facilities, but the biannual increases are uniform. In all other respects, the three collective-bargaining agreements are identical. Second- and third-shift employees receive a 25-cent-per-hour differential and employees who work weekends receive a 35-cent-per-hour differential. There is no reopener provision.

The following individuals are admitted agents and supervisors of Respondent within the meaning of the Act: Michael Wilson, vice president of labor relations, Ray Martinez, vice president of human resources, Thomas Lowencamp, regional vice president, Beth Wilson, human resources manager, Carolyn Gibson, area vice president, Gail O'Keefe, administrator, Kathleen Champlin, administrator, Theodore Powell, administrator, Dean Smith, administrator, and Toni Fuzo, administrator.

On February 2, Respondent filed a Chapter 11 petition in the United States Bankruptcy Court for the District of Delaware and remained in bankruptcy proceedings as of the time of the hearing. Respondent has not sought an order under Section 1113 of the Bankruptcy Code permitting recision or modification of the collective-bargaining agreement.

B. Washington Square

At the hearing, the parties stipulated that on October 1, 1999, Respondent implemented at its Washington Square facility new weekend hourly wage rates for employees known as weekend warriors. These wage rates were $12 per hour for State tested nursing assistants (STNAs), $19 per hour for LPNs, and $23 per hour for RNs.[2]

Carolyn Munford is an administrative organizer for the Union who services the Washington Square facility. Munford testified that she first learned of the weekend warrior program on or about November 11, 1999, when she had a conversation with a person who had been hired as a weekend warrior. She was not notified of the existence of the program by management until August 28, 11 months after the program was implemented. In a meeting with Beth Wilson and Toni Fuzo held on August 28, Munford was given a one-page bullet point summary describing the program as follows:

> Casual position—not full time or part time
> Requires working 3 weekends per month for bonus pay
> No benefits except holiday pay at base rate
> Paid at base rate if miss weekend
> Base rate if want to work additional shifts

[2] As of October 1, 1999, the contractual hourly wage rate was $7.30 for STNAs and $11.85 for LPNs employed at Washington Square. There was no delineated contractual wage rate for RNs.

Shift differential per current policy

At the same meeting, Wilson and Fuzo also gave Munford a letter addressed to her dated September 16, 1999. Munford denied ever seeing this letter prior to August 28. In the letter, Fuzo wrote:

> I am forwarding you the new experimental weekend position: Washington Square wants to develop new weekend only positions. These positions may be posted as (1) Saturday and Sunday, (2) Friday, Saturday, Sunday (3) Saturday, Sunday, Monday. . . . The positions would be posted by the labor agreement. . . . These new positions are part time and the employee would be eligible for any benefits the contract provides.

Munford testified weekend warriors perform bargaining unit work: hands-on patient care including bathing, showering, and feeding patients. She further testified that individuals who choose to be weekend warriors sign an individual agreement which provides in relevant part:

> [I] agree to work three weekends per month for the wage scale circled below. If I don't fulfill this agreement, my wage scale will revert back to the base rate as stated above and be deducted from the following pay if it has already been paid. Any additional hours I pick up will also be paid at the base rate as stated. Premium Pay Days worked will be paid at time and one-half, calculated using the base rate following completion of [my] 90 day probationary period.

At the time of the hearing, Pam Sneed was employed as a weekend warrior. Sneed did not testify and it is not clear from the record when she was hired. Munford testified that Respondent deducted the Union's initiation fee from Sneed's pay, but did not deduct the periodic dues. A work schedule covering the period January 1 to 22 reflects Sneed worked 13 days, each Friday through Monday.

C. Crestwood

The parties stipulated at the beginning of January 2000 Respondent implemented a 90-day test program by which an additional weekend differential of $1.50 per hour was paid to all staff. It was further agreed that Respondent maintained this weekend differential continuously beyond the 90-day period. The Union consented to the 90-day testing period, but did not consent to the extension of the weekend differential beyond March 7.

Patrick Deininger, the Union's administrative organizer, testified he first learned of the extension of the weekend differential beyond March 7 from employee members at Crestwood. He telephoned Gail O'Keefe in the first week of April and told her the Union objected to the extension without discussing the matter with the Union. Deininger requested a labor management meeting be held on April 21 and O'Keefe agreed to meet. In the interim, by letter dated April 14, O'Keefe advised Deininger that due to staffing shortages she was confirming her intention to increase and modify the nursing department wage rate structure, giving a $2 per hour increase to RNs, $1.15 increase to LPNs and a 60-cent increase to STNAs. O'Keefe wrote that she was looking to increase shift differentials to 75 cents and $1, and that she would continue to maintain the $1.50 weekend shift differential beyond the 90-day test period. O'Keefe wrote that "these rates are in addition to the April increase, per the union contract, and in addition to the scheduled increase in October, also per the contract." O'Keefe further advised Deininger that Respondent would be giving RNs and LPNs with 3 to 5 years' experience an additional $2, and with 5 or more years' experience, an additional $3. O'Keefe closed by writing that she planned on implementing the new rates effective April 26.

On receiving the letter, Deininger called O'Keefe and advised her the Union objected to a number of items in the letter. The parties met on April 21 and the Union again registered its objections to the wage increases. According to Deininger, the changes were implemented notwithstanding the Union's objections.

D. Meadowview

By letter dated March 20, Caroline Gibson wrote to Deininger advising him that due to staffing problems and the use of temporary agency employees at the Meadowview facility, she was proposing to increase both the starting rates and current rates for LPNs and STNAs by 55 cents effective April 1. This increase would be in addition to the contractually scheduled increase on April 1. She also proposed to increase the shift differentials for LPNs and STNAs to $1 on the second shift and 50 cents on the third shift, and to increase the shift differentials for all other job classifications by 50 cents on the second shift and 50 cents on the third shift. The shift differential changes would, according to Gibson, be temporary for 90 days, effective April 1 to June 29 after which time the shift differential would revert to the contractual rate. Gibson closed by stating, "please respond with the approval for this proposal by 3/27/00 in order for us to meet the 4/1/00 implementation date." On March 29, Gibson and Deininger spoke by telephone and Deininger asked for points of clarification. In response, Gibson faxed him another copy of the March 20 letter with handwritten notations. They again spoke by phone and Deininger said that although he did not think her proposals would be well received by employees because the raises did not affect all employees at the site, he would submit her proposals to a voice vote.

On March 31, Deininger conducted a vote of employees and Respondent's proposed changes were defeated by a vote of 28 to 2. That same day, he submitted a set of counterproposals to Gibson which provided for: (1) all current employees, and the current starting rates for LPNs and STNAs, would be increased 55 cents on April 1 in addition to the contractual raises; (2) the shift differentials for all employees would be increased by $1 on the second shift and $1 on the third shift. That same day, Raymond Martinez addressed a letter to Dave Regan, district president of the Union, which stated that since Respondent and the Union had not been able to reach an agreement, Respondent had "no other alternative but to unilaterally implement" the following wage changes for LPNs and STNAs effective April 7: (1) an increase in the starting rates for LPNs and STNAs by 55 cents per hour; (2) an increase in the shift differential of LPNs and STNAs for the second shift to $1 per hour for 90 days; (3) an increase in the shift differential of LPNs and STNAs for the third shift to 50 cents per hour for 90 days; (4) an increase in the shift differential for all other employees working the second and third shifts to 50 cents per hour for 90 days; (5) employees who received the

higher shift differential during the 90-day period would maintain that differential; and (6) employees hired after July 7 would receive the current contract shift differential. Martinez, who testified at the hearing, was not questioned about this letter.

On the afternoon of March 31, Deininger called Martinez and asked if he had even considered the Union's counterproposals. Martinez said he had not seen the counterproposals and that the Union "was screwing" Respondent and holding it hostage. Martinez told Deininger there were staffing shortages in the nursing department at the Meadowview facility, but that other departments were not suffering shortages. Deininger disagreed and said he had information that other departments were experiencing shortages as well. Martinez responded that management was only concerned with the nurses and they were going to do what they had to do. Martinez was not questioned about this conversation during his testimony.

The parties stipulated that on April 7 Respondent implemented the new starting rates for LPNs and STNAs at Meadowview as well as new shift differentials for those two classifications as set forth in Martinez' March 31 letter.

E. Canterbury Villa

The parties stipulated that on April 29 and 30 Respondent, at its Canterbury Villa facility, offered a weekend bonus of $25 to nurses and nursing assistants willing to pick up an additional shift or work a double shift in order to fill vacancies in the schedule.

F. May 2 Meeting

On May 2, the parties met in Columbus, Ohio, to discuss Respondent's wage increases. Among those present were Regan for the Union and Michael Wilson, Martinez, and Gibson for Respondent. Regan testified that he advised the management representatives that while the Union shared their concern about wage rates in certain labor markets and was willing to discuss this issue, the Union would not consent to the wage increases in the absence of a comprehensive settlement that addressed issues that were of concern to the Union. Regan stated the Union wanted Respondent's support for pending staffing legislation and also wanted organizing rights at Respondent's nonrepresented facilities. According to Regan, it was made clear to him that regardless of the Union's unwillingness to consent, the wage rate changes would go into effect. Regan commented to Mike Wilson, "This is pretty strange. You bring us to a meeting to talk about these subjects. And you make it clear what we have to say is not important to you." Wilson responded, "Well, we have to do what we have to do." According to Regan, the reason given by management for the implementation of the wage increases was to enable Respondent to recruit and retain employees.

Michael Wilson did not testify and Martinez and Gibson were not asked any questions about this meeting during their testimony.

G. Auburn Manor

The parties stipulated that on June 5, Respondent, at its Auburn Manor facility, implemented three wage incentive plans effective through July 30: a recruitment bonus for employees referring new hires to the facility, a sign-on bonus for the new hires and an extra shift bonus of $2 per hour for all employees.

H. Crestwood, Rosewood and Village Care Facilities

The parties stipulated that on August 7 Respondent, at its Crestwood facility, implemented new starting rates and shift and weekend differential rates for RNs, LPNs, and STNAs. The new start rates were $20 per hour for RNs, $14 per hour for LPNs, and $9 per hour for STNAs. The new shift differentials were $1 per hour for the second shift and 75 cents per hour for the third shift. The weekend differential of $1.50 per hour, previously implemented and extended, was continued. The parties further stipulated that on August 7 Respondent implemented the same changes at the Rosewood and Village Care facilities with the only difference being that LPNs were to have a starting rate of $14.50 per hour.[3]

I. Grievances Filed

In the spring of 2000, the Union filed several grievances relating to the wage increases but withdrew the grievances and filed the unfair labor practice charges in this case. Deininger testified since the wage increases were outside the terms of the collective-bargaining agreements, and because there are no reopener provisions in those agreements, the increases fell outside the scope of the agreements and an arbitrator would not have jurisdiction over the matter.

J. Staffing Shortages

Prior to implementing each of the foregoing wage increases, Respondent conducted local wage surveys and Gibson testified that in every case, with the exception of Auburn Manor, Respondent's wage levels at each of the facilities were lower than those of its competitors.[4] In December 1999, one-third of the nursing department positions were unfilled at Meadowview and Crestwood. At Rosewood, 10 out of 50 nursing positions were unfilled, at Village Care; 5 out of 20; and at Auburn Manor, 10 out of 50. There were a minimal number of openings in the nursing departments at Washington Square and Canterbury. By mid-August 22 out of approximately 52 nursing positions at Meadowview were unfilled. Gibson testified the average employee turnover rate in the industry is 70 percent; at Meadowview, the turnover rate was over 100 percent. In December 1999, Respondent restricted patient admissions at Meadowview and Crestwood due to staffing shortages. This restriction lasted 3 to 4 months at Meadowview and 4 to 6 months at Crestwood. At no time did the State of Ohio or the Federal government order any facility closed as a result of staffing shortages.

Temporary agency employees were used to supplement the regular complement of employees. At Meadowview and Crestwood, Respondent considered the use of agency employees to be so high that it negatively impacted the quality and continuity of patient care. In the years 1998, 1999, and 2000, agency usage jumped from zero to $8454 to $25,221 at Village Care; from $44,168 to $440,094 to $560, 215 at Crestwood; and from zero to

[3] As of August 7, RNs, LPNs, and STNAs at Crestwood were earning $15, $11.85, and $7.40 per hour, respectively, and at Rosewood, $14.45, $11.30, and $7.35 respectively. At Village Care, the contractual rate for STNAs as of August 7 was $7.35 per hour. The Village Care agreement did not specify a rate for RNs or LPNs.

[4] Gibson did not have oversight responsibility for Auburn Manor and was unfamiliar whether a wage survey was conducted as to that facility.

$219,258 to $437,371 at Meadowview. In that same period, agency usage at Rosewood Manor and Auburn Manor generally declined. In January 2001, after the wage increases were implemented at Meadowview, agency usage dropped to $5000 for the month.

IV. ANALYSIS

Respondent concedes the Union did not consent to any of the wage increases implemented between October 1, 1999, and August 7, 2000. Respondent's primary defense to the unilateral changes is that the contractual wage rates were not competitive and led to Respondent's inability to retain existing employees or to attract qualified applicants. The resulting staffing shortages led to excessive overtime and use of temporary agency employees which, in turn, led to diminution in the quality of patient care. In the cases of Meadowview and Crestwood, patient admissions had to be restricted for periods of time due to staffing shortages. Respondent insists that there is no economic underpinning to this defense, rather, its motivation in granting the wage increases was due purely to "operational exigencies." The reality, however, was that if the staffing shortages persisted Respondent would have had to continue to limit patient admissions at some or all of the facilities. Ultimately, if the problem remained unsolved, Respondent would have had to close these facilities. Contrary to Respondent's characterization, the motivation for granting the wage increases was wholly economic; if Respondent could not staff its facilities, it could not remain in business. The good intentions of Respondent to stay in business and to deliver quality patient care are, however, irrelevant to the issue of whether Respondent violated the Act when it unilaterally granted the wage increases during the term the collective-bargaining agreements. The unambiguous language of Section 8(d) explicitly forbids midterm modification of a collective-bargaining agreement's wage provisions without the Union's consent. *Oak Cliff-Golman Baking Co.,* 207 NLRB 1063, 1064 (1973).

Respondent further contends that the Union unreasonably withheld its consent to the wage increases. Again, even if this were true, it is an irrelevant consideration. While a contract is in force, Section 8(d) permits a union to refuse, even unreasonably, an employer's proposal to modify the terms established by a collective-bargaining agreement. Where, as here, there is no reopener provision, the Union had no obligation even to discuss, much less to agree to, any modification. *Standard Fittings Co. v. NLRB*, 845 F.2d 1311 (5th Cir. 1988).

With respect to the weekend warriors at Washington Square, the General Counsel contends they are regular part-time employees covered by the unit A agreement. Respondent contends that they are casual employees and not part of the unit. The test for determining whether individuals are casual employees takes into account factors such as regularity and continuity of employment and similarity of work duties. The individual's relationship to the job must be examined to determine whether the employee performs unit work with sufficient regularity to demonstrate a community of interest with remaining employees in the bargaining unit. *Continental Winding Co.*, 305 NLRB 122, 124 (1991); *Pat's Blue Ribbons,* 286 NLRB 918 (1987).

The documentary evidence on the issue of weekend warriors is ambiguous. On August 28, Respondent gave the union representative two documents, one characterized the weekend warrior position as casual, and the other characterized it as part time. One document stated that the weekend warriors would be eligible for all benefits under the collective-bargaining agreement, the other stated no contractual benefits applied other than holiday pay. Munford's testimony establishes that weekend warriors perform bargaining unit work. What the evidence fails to establish, however, is how many weekend warriors have been employed since October 1999 and the frequency and regularity with which they have worked. Weekend warriors are not required to work 3 weekends per month. They are only required to work 3 weekends per month in order to receive the premium pay rate. If they work less than 3 weekends per month, they are paid at a base rate.[5] Munford's testimony was limited to the experience of one individual, Pam Sneed, who worked 13 out of 22 days in January 2001. It would be entirely speculative to extrapolate from Sneed's experience that an undetermined number of weekend warriors have worked with the same regularity. The burden of proof is on the General Counsel to show that the weekend warriors should be included in the bargaining unit. *Continental Winding Co.*, 305 NLRB 122, 124 (1991). The General Counsel has demonstrated that weekend warriors perform work in unit jobs but has failed to meet the additional burden required under *Pat's Blue Ribbons* showing that the weekend warriors worked continually and regularly for Respondent with expectations of continued employment. I, therefore, recommend dismissal of the complaint allegation relating to the wage increases given to weekend warriors at the Washington Square facility as the General Counsel has failed to prove they are regular part-time employees covered by the unit A agreement.

Several of Respondent's remaining defenses merit brief discussion. Respondent's filing for bankruptcy on February 2, 2000, is not a defense to the unilateral increases granted prior to that date. As to the unilateral raises granted after that date, Respondent did not seek an order under Section 1113 of the Bankruptcy Code and in the absence of such an order it was not privileged to modify the terms of the collective-bargaining agreements. *Crest Litho, Inc.*, 308 NLRB 108 (1992). Neither the management-rights clause in the collective-bargaining agreements (art. 6, sec. 1) nor the zipper clause (art. 14, sec. 7) on their face constitute a waiver of the Union's right to object to a modification of the wage provisions and no evidence was adduced concerning the bargaining history surrounding these provisions. Moreover, article 14, section 2 specifically requires that any modification of the agreements be consented to by both sides in writing. Finally, deferral of this case to the grievance arbitration provisions of the agreements is inappropriate. There is no basis to conclude that the contracts' terms even arguably authorized the actions taken by Respondent. I have considered Respondent's remaining arguments and find them to be without merit.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[5] It is not clear what the base rate is for weekend warriors or if it varies from individual to individual.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following units of employees are appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> *Unit A*: All service and maintenance employees at the Employer's following facilities: Auburn Manor in Washington Court House, Crestwood Care Center in Shelby, Meadowview Care Center in Seville, Canterbury Villa of Alliance in Alliance, Washington Square in Warren, Baltic Country Manor in Baltic, Horizon Meadows in Alliance, Hudson Elms Nursing Home in Hudson and Village Square in Stow, including but not limited to: state tested nurses aides, environmental aides, supply clerks, ward clerks, cooks, dietary aides, laundry aides, housekeepers, maintenance workers, activities assistants, rehabilitation aides, restorative aides, and registered and licensed practical nurses; but excluding clerical employees, confidential employees, Director of Maintenance, Director of Social Services, Director of Activities, therapists, licensed physical therapy assistants, temporary employees, professional employees and all guards and supervisors as defined in the National Labor Relations Act.
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> *Rosewood unit*: All service and maintenance employees at the Employer's Rosewood facility in Galion, Ohio, including but not limited to: state tested nurses aides, environmental aides, supply clerks, ward clerks, cooks, dietary aides, laundry aides, housekeepers, maintenance workers, activities assistants, rehabilitation aides, restorative aides, and registered and licensed practical nurses; but excluding clerical employees, confidential employees, Director of Maintenance, Director of Social Services, Director of Activities, therapists, licensed physical therapy assistants, temporary employees, professional employees and all guards and supervisors as defined in the National Labor Relations Act.
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> *Village Care unit*: All service and maintenance employees at the Employer's Village Care facility in Galion, Ohio, including but not limited to: state tested nurses aides, environmental aides, supply clerks, ward clerks, cooks, dietary aides, laundry aides, housekeepers, maintenance workers, activities assistants, rehabilitation aides, restorative aides, and registered and licensed practical nurses; but excluding clerical employees, confidential employees, Director of Maintenance, Director of Social Services, Director of Activities, therapists, licensed physical therapy assistants, temporary employees, professional employees and all guards and supervisors as defined in the National Labor Relations Act.

4. The Union is the exclusive representative of the employees in the appropriate units for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. Since on or about March 7, 2000, Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally increasing the weekend differential and shift differential rates for employees, increasing the hourly wage rate for nursing department employees and granting experience pay to nursing department employees at the Crestwood facility.

6. Since on or about April 7, 2000, Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally and without the Union's consent increasing starting wage rates for LPNs and STNAs and by increasing shift differentials for employees at the Meadowview facility.

7. On or about April 29 and 30, 2000, Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally and without the Union's consent offering a weekend bonus to nurses and nursing assistants at the Canterbury Villa facility.

8. Since on or about June 5, 2000, Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally and without the Union's consent implementing three wage incentive plans at the Auburn Manor facility.

9. Since on or about August 7, 2000, Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally and without the Union's consent increasing the starting wage rates and shift and weekend differential rates for nursing department employees at the Crestwood, Rosewood, and Village Care facilities.

10. Respondent did not violate the Act by granting wage increases to weekend warriors employed at the Washington Square facility.

11. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Respondent contends that a bargaining order may not issue in this case because the three collective-bargaining units are mixed unit, which include professional registered nurses with nonprofessional employees. The General Counsel maintains that these units were voluntarily recognized by Respondent when it took over the facilities in January 1998 and that Respondent thereafter negotiated and entered into collective-bargaining agreements covering these units. Under these circumstances, the General Counsel argues that a bargaining order may appropriately issue.

The law governing the appropriateness of voluntarily established mixed professional and nonprofessional units is clear. The Board has consistently held that there is nothing in Section 9(b)(1) or its legislative history to suggest that Congress intended that section to invalidate as inappropriate a historically established contract unit simply because of a joinder of professional and nonprofessional employees. *Retail Clerks Local 324 (Vincent Drugs)*, 144 NLRB 1247 (1963). The sole operative effect of Section 9(b)(1) is to preclude the Board from taking any action that would create a mixed unit of professionals and nonprofessionals without first according the professionals involved the opportunity of a self-determination election. *A. O. Smith Corp.*, 166 NLRB 845 (1967). An employer has no obligation to agree to bargain in a combined unit, *Russelton Medical Group*, 302 NLRB 718 (1991). But where the parties have voluntarily created and maintained a combined unit over a period of time, the unit may be found appropriate within the meaning of Section 9(b)(1). *St. Luke's Hospital Center*, 221 NLRB 1314 (1976).

The Union has represented the employees at Rosewood and Village Care since 1990, and at the remaining facilities since 1995. While these facilities were under the ownership of Horizon Healthcare, prior to January 1998, the Union represented the

employees in these facilities in combined units of professionals and nonprofessionals. The only evidence of a self-determination election being conducted was in 1996 at Rosewood when the RNs voted to be part of the LPN unit, and shortly after that election, the Union and Horizon agreed to fold the RN/LPN unit into the larger service and maintenance unit. When Respondent took over the operation of the facilities in January 1998, it continued to recognize the Union as the representative of employees in the same unit configurations. From January to April 1999, Respondent and the Union negotiated the terms of successor collective-bargaining agreements and Respondent signed those agreements covering combined units of professionals and nonprofessionals. The first time Respondent raised an objection to the inclusion of RNs in these units was in this litigation.[6] Thus, this case is distinguishable from *Russelton Medical Group* relied on by Respondent in its brief. In *Russelton*, the employer raised an objection to the combined unit immediately on its being confronted with a demand for recognition. Here, Respondent has recognized and bargained with the Union in these units for over 3 years and in that time, negotiated and executed three collective-bargaining agreements. In these circumstances, the contractual bargaining units are appropriate and a bargaining order remedy based on Respondent's unfair labor practices may issue.

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent must rescind, on the request of the Union, any changes in wages, rates of pay, benefits, and other terms and conditions of employment unilaterally implemented since March 7, 2000.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Integrated Health Services, Inc., Washington Square in Warren, Crestwood Care Center in Shelby, Meadowview Care Center in Seville, Canterbury Villa of Alliance in Alliance, Auburn Manor in Washington Court House, Rosewood in Galion and Village Care in Galion, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally and without the Union's consent modifying or changing wages, rates of pay, benefits, or any other term and condition of employment set forth in the collective-bargaining agreements during the term of the collective-bargaining agreements.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) On request by the Union, rescind any changes in wages, rates of pay, benefits or any other term and condition of employment unilaterally implemented since March 7, 2000.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze, if appropriate, the wages and benefits rescinded under the terms of this Order.

(c) Within 14 days after service by the Region, post at the following facilities in Ohio copies of the attached notice marked "Appendix."[8] Washington Square in Warren, Crestwood Care Center in Shelby, Meadowview Care Center in Seville, Canterbury Villa of Alliance in Alliance, Auburn Manor in Washington Court House, Rosewood in Galion and Village Care in Galion. Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at those facilities at any time since March 7, 2000.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

[6] In both its original answer filed on August 15, 2000, and in its answer to the amended consolidated complaint filed on October 16, 2000, Respondent admitted that these units were appropriate within the meaning of Sec. 9(b). It was only in its amended answer filed literally on the eve of trial, on January 29, 2001 (correction made according to an erratum issued on June 6, 2001), that Respondent denied for the first time the appropriateness of these units.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally and without the Union's consent grant wage increases to you or otherwise change your rates of pay, benefits, or any other term and condition of your employment as provided for in the collective bargaining agreement between us and District 1199, The Health Care and Social Service Union, SEIU, AFL–CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request of the Union, rescind any changes to your wages, rates of pay, benefits, or any other term and condition of your employment implemented by us without the Union's consent.

INTEGRATED HEALTH SERVICES, INC.